Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 87-1594

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

Petitioner,

-against-

BOROUGH OF MANHATTAN COMMUNITY COLLEGE

Respondent

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY STATEMENT TO RESPONDENT'S POSITION IN OPPOSITION.

Question Presented

Are the issues raised exclusively factual and, therefore, mandate no questions for review by this Court.

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REPLY TO RESPONDENT'S POSITION IN OPPOSITION

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THE WRIT OF CERTIORARI SHOULD NOT BE DENIED. THE ISSUES RAISED ARE NOT EXCLUSIVELY FACTUAL. THERE ARE ISSUES FOR REVIEW BY THIS COURT.

In opposition to the Petition for Writ of Certiorari, Respondent argues that the issues raised by Petitioner are exclusively factual, and, therefore, there are no questions for review by this Court. To support this argument Respondent's organization of the facts misstates the record, which must be corrected. It is the District Court's findings of fact on the basis of unsubstantiated testimony that Petitioner argues is error. Respondent states that the complaint was properly dismissed, where the defendant met its burden to articulate a nondiscriminatory reason for its rejection of plaintiff, namely her

lack of qualifications for the position, and plaintiff failed to show that this reason was a pretext for discrimination. Respondent's burden of production was met only through unsubstantiated averments by their chief witness, former Dean Myron Pollack. Respondent attempts to avoid substantiating by stating that the Chancellor's office had mandated that a separate remediation program be established (R.B., p. 8).[1] This was only an averment by Pollack. No corroboration was submitted. The statement that Pollack and President Draper were under tremendous pressure

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1. Numbers in parentheses, preceded by R.B. refer to pages of Respondent's Brief in Opposition to Petition for Writ of Certiorari.

Numbers in parentheses, preceded by A, refer to pages of Joint Appendix A filed in the Second Circuit.

to establish a remediation program (R.B., p. 9) was only an unsubstantiated averment by Dean Pollack. The statement that while the offer of a position was pending to Dr. Minor, a search committee was formed because there was great pressure to fill the position (R.B. p. 10), was an uncorroborated averment by Dean Pollack. Respondent states that eight or ten candidates were actually interviewed by the search committee (R.B. p. 12). Respondent did not produce any committee members to corroborate his averment. In order to make it look like Petitioner was deficient in leadership and administrative experience, Respondent states that although Petitioner served temporarily as coordinator of the evening session, she was not asked to return to this position at the conclusion of the summer session (R.B. p. 13). The inference of a poor evaluation is not

mirrored in Petitioner's personnel file, from which all her performance evaluations from 1964-1972 were introduced into evidence. The reason that Petitioner did not assume the position of coordinator of the evening session was because she was elevated to the position of Chairperson of the English Department (A-165):

> I wish to congratulate you on your election as Chairman of the English Department for the year beginning July 1, 1968....
>
> Dean Draper
> [Plaintiff's Exhibit 19K]

Respondent also states that Dr. Keizer, the black male who was appointed to the position, set up a successful remediation program "almost single-handedly" (R.B. p. 14).[2] There was no

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2. Mervyn Keizer was removed for cause and notified in March, 1974, seven months after his appointment. The job title was then discontinued for several years (A-189).

corroboration or substantiation of this averment by Dean Pollack. Nothing was submitted into evidence in the form of documentation or corroborative witnesses. In contrast, Petitioner introduced three references who said she was qualified and she submitted documentation (A-139):

> Dr. Croman was asked by the administration in the summer of 1965 to take over the extremely demanding job of setting up the remedial and tutorial program--She did a magnificent job.
>
> Dr. Eric James, Dean of Faculty
> Murray H. Block, President

[Plaintiff's Exhibit 18]

It is necessary to point out the above misstatements as supportive of Petitioner's point that without demanding evidentiary support, the District Court deferred to academic judgment, instead of deferring to the requirements of Title VII, as amended. To force Petitioner to

disprove Pollack's "judgment" is to ask that she argue a negative, an impossibility. The only way his "judgment" can destroy her prima facie case is to demonstrate that it is mirrored in her file, and that he could not do. Petitioner submits that the District Court erred in requiring an unsubstantiated averment by Respondent as sufficient evidence to destroy Petitioner's prima facie case.

Respondent states that there was no need for the District Court to specifically state that it did not credit Dr. James' testimony that Dean Pollack did not want to hire a woman (R.B. pp. 24-25). Petitioner disagrees. Petitioner contends that if the court rejects direct evidence of discrimination as not credible it must say why (Petition for Writ of Certiorari, pp. 14-21). It is error for the Court to accept Dean

James' testimony as support for a finding of an inference of gender discrimination in general (Petition for Writ of Certorari, A-18), but not for direct evidence of discrimination against Petitioner.

Respondent makes much of arguing that Dean Pollack recruited a woman for the job (R.B., p. 26), and that this fact was properly considered by the Court in support of its finding that Petitioner had failed to prove discrimination. Petitioner contends that this is asking Petitioner to prove she was not considered solely because of her sex. Title VII of the Civil Rights Act does not require that discriminatory animus be the sole reason for the employer's actions. Congress specifically rejected a proposed amendment which would have added the word "solely" on the ground that such a limitation would emasculate

the Act (110 Cong. Rec. 2728). Petitioner argues that being told she was not wronged, because another woman was offered the job, is not permissible under Connecticut v. Teale, 457 U.S. 440 (1982), because the District Court found a policy of gender discrimination in general in operation at Petitioner's college (Petition for Writ of Certiorari, A-18).

Respondent's last point is that the college's choice of a highly qualified black administrator to supervise a remedial program for black students is acceptable under Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), Reh. den'd., 106 S. Ct. 3320 (1986) and Fullilove v. Klutznick, 448 U.S. 448 (1980). Petitioner's reply to this is 1) that Respondent has not shown that Mervyn Keizer was more highly qualified than Petitioner; 2) that it was error

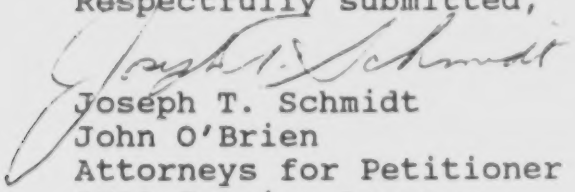
for the Court to so find in the absence of evidence to that effect; 3) that Wygant specifically rejects a "role model" rationale and 4) that no compelling governmental interest was shown in contrast to Fullilove where quotas were set up to remedy past inequities in awarding government contracts to minorities. There was "no past inequities in employment" situation in this case. It was a preference for race over gender.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

April 29, 1988

Respectfully submitted,



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